TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 365.

THE UNITED STATES, APPELLANTS,

vs.

ANDREW J. GILL.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 15, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 365.

THE UNITED STATES, APPELLANTS,

vs.

ANDREW J. GILL.

APPEAL FROM THE COURT OF CLAIMS.

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1 U. S. Court of Claims.

ANDREW J. GILL (No. 2) vs. THE UNITED STATES. } No. 6196.

Petition.—Filed July 16, 1870.

To the honorable the Court of Claims:

The petition of Andrew J. Gill, a citizen of the United States, respectfully represents: That in the fall of 1864 he furnished to the United States, at Point of Rocks and vicinity, west of Fort Lyon, C. T., on the Arkansas River, under a written contract, 2,000 tons of hay, at the price of $38.50 per ton, all of which was duly received and paid for by the United States.

Anticipating a further demand for hay by the United States at that point, your petitioner prepared and had ready, at the same time and place, an additional quantity of 536 tons of good merchantable hay.

Your petitioner further shows that on or about the 27th day of November, A. D. 1864, at Point of Rocks, in the vicinity of Fort Lyon, C. T., he delivered the said lot of 536 tons of hay to the officers of the Quartermaster's Department of United States Army, and that said hay was received and used in the public service; that the reasonable value of the said hay at the time and place of its delivery aforesaid was $38.50 per ton, whereby an implied contract has arisen to pay your petitioner the sum of $20,636.00, all of which now remains due and unpaid.

Your petitioner further shows that said claim has been presented to the accounting officers of the Treasury, and rejected for an alleged want of jurisdiction; that the Quartermaster-General refused to recommend the allowance of this claim to the accounting officers of the Treasury, upon the ground that he was not satisfied of the justice of it.

2 Petitioner further shows that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government of the United States; and he prays judgment of this honorable court for the said sum of $20,636.00, and for such other and further relief as the nature of the case may show he is entitled to.

HARVEY SPALDING,
Attorney for Claimant.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Harvey Spalding, being duly sworn, deposeth that he is attorney for the claimant in the foregoing petition; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition is stated; that claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; that he believes and the facts as stated in said petition are true.

HARVEY SPALDING.

Sworn to and subscribed before me this 16th day of July, 1870.
[SEAL.] EDM. F. BROWN,
Notary Public.

Claimant's address:
A. J. GILL, *Denver, C. T.*
Claimant's solicitors:
C. F. PECK and HARVEY SPALDING, *Washington, D. C.*

3 In the United States Court of Claims. December term, A. D. 1869.

ANDREW J. GILL (No. 2)
vs.
THE UNITED STATES. } No. 6196. Filed Sept. 22, 1870.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of twenty thousand six hundred and thirty-six dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THOMAS H. TALBOT,
Assistant Attorney-General.

4 In the Court of Claims.

ANDREW J. GILL (No. 2)
vs.
THE UNITED STATES. } 6196.

At a Court of Claims held at the Capitol, in the city of Washington, 21st day of October, A. D. 1873, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Andrew J. Gill, claimant, have and recover of and from the United States the sum of eighteen thousand and ninety dollars ($18,090.00) *cents.*

By the court.

5 In the Court of Claims of the United States. Dec. term, 1873.

ANDREW J. GILL (No. 2)
vs.
THE UNITED STATES. } No. 6196.

From the judgment rendered in the above-entitled cause on October 21, 1873, in favor of the claimant, the defendants, by their Attorney-General, on the 17th day of December, 1873, make application for and give notice of an appeal to the Supreme Court of the United States, the amount in controversy in said cause exceeding three thousand dollars, to wit, eighteen thousand and ninety dollars.

JOHN GOFORTH,
Asst. Atty. General.

Filed Dec. 17, 1873.

AT CHAMBERS.
Allowed.

C. D. DRAKE, *C. J.*

6 United States Court of Claims.

ANDREW J. GILL
vs.
THE UNITED STATES. } No. 2.

Findings of fact and conclusions of law.

I. In November, 1864, the claimant was the owner of 536 tons of hay at Point of Rocks, near Fort Fillmore and Fort Lyon, in the Territory of Colorado. On the 27th November, 1864, he applied to Lieutenant Clark Dunn, the commanding officer at Fort Fillmore, to purchase the same for the use of the defendants. Lieutenant Dunn declined to make the purchase, on the ground that he was not authorized, but he gave to the claimant his receipt in writing, wherein it was stated that he had "received of A. J. Gill five hundred and thirty-six tons of hay, in good order and well ricked, for the use of the Government," which was signed "Clark Dunn, First Lieut. 1st Cav. of Col., comd. Camp Fillmore," and he at the same time referred the claimant to the commander of the district and to the quartermaster at Denver, who could purchase the hay if they saw fit. The commander of the district was applied to, but declined to purchase at that time. During the same month the military inspector of the district of Colorado, anticipating a short supply of hay for the winter, ordered Lieutenant Cossett, the quartermaster of Fort Lyon, "to take the hay belonging to Andrew J. Gill and use it for Government stock." After this the claimant exercised no control over the hay. And the defendants having proved on the trial that the claimant left Colorado on the 4th February, 1865, on business of his own, and that he did not return until the summer of 1866, and that in consequence of Indian troubles then existing it was unsafe for small parties to remain outside of Government posts, he was compelled to leave the hay without any one in charge of it, but in July, 1865, his agent visited the place and found the entire 536 tons gone, the court finds as matter of fact that the claimant did not abandon or intend any abandonment of the hay, and that at the time he left the Territory it had gone into Government use, as set forth in the next finding.

II. In the month of December, 1864, and during the winter 1864-'65 the quartermaster and forage-master at Fort Lyon directed Government trains to go to the hay and quarter there. A military expedition having about 2,000 horses was also quartered there, and used the hay. In the spring, about one-half of the hay had been fed to Government animals, about one-quarter had been thrown out of the ricks, trampled down, wasted, and destroyed, and about one-quarter remained in the ricks, though in a worthless condition.

III. After Lieutenant Dunn was relieved at Camp Fillmore, his successor, Lieutenant Dennison, assumed the responsibility of the custody of the hay, and in June, 1865, the post commander at Fort Lyon ordered the quartermaster there to receive the balance of hay remaining, so as to relieve Lieutenant Dennison from responsibility. A board of
7 survey being demanded, it was found that the balance remaining was spoiled and worthless, and no receipt was given or responsibility assumed by the post quartermaster.

IV. The fair and reasonable value of the hay in November, 1864, was $38.50 per ton, and during the winter, at the time it was used, $45 a ton.

And upon the foregoing facts the Court of Claims decides, as a conclusion of law:

There being no valid express contract founded upon advertisement or military exigency for the sale and purchase of the hay, the defendants

are not liable for the entire quantity alleged to have been sold in November, 1864, at $38.50 per ton. But the defendants are liable for the hay taken and used at its fair and reasonable value at the time of taking; and they are responsible for the wasteful and destructive manner in which it was taken and used; and the claimant should recover for three-fourths of the entire quantity ricked, at the rate of $45 a ton.

NOTT, J., delivered the opinion of the court:

The question in this case relates to the extent of the Government's liability where private property has been taken by its agents without there being a valid express contract to fix the rights and liabilities of the parties. The court is not agreed upon the point at which this liability begins and ends. And it is to be understood that the report of the cases of Adams and Solomon (7 C. Cls. R., p. 437, 482) states a point as determined which is yet unsettled by this court, and cannot be until a case can be heard before a full bench. In the present case it is differently thought that the claimant should recover for the entire quantity of the hay, for three-fourths, and for only one-half. But as a majority concur that he is entitled to three-fourths, if no more, judgment will be rendered accordingly.

The judgment of the court is that the claimant recover of the defendants the sum of $18,090.

DRAKE, CH. J., dissenting:

I dissent from the opinion just read.

The case, in its material features, is set forth in the claimant's petition, and in an affidavit made by him in support of his claim, and filed in the Department of War. From those papers I gather the principal part of the facts which will now be stated.

In the fall of the year 1864, the claimant, under a written contract, furnished to the United States at Point of Rocks and vicinity west of Fort Lyon, Colorado, on the Arkansas River, 2,000 tons of hay, at $38.50 per ton; which was duly received and paid for by the United States.

Anticipating a further demand for hay by the United States at that point, the claimant continued cutting hay until frost came, in order to be sure to have sufficient to fill said contract, and because he believed the Government would need any surplus that he might have. The result was, that he prepared and had ready the additional quantity of 536 tons of hay, over and above the 2,000 tons furnished under his contract.

Lieutenant Clark Dunn, quartermaster at Camp Fillmore, concurred with the claimant in the belief that the Government would need all the hay in that neighborhood; but as he was not authorized to purchase, he gave to the claimant a memorandum receipt in the following words:

"POINT OF ROCKS, *November* 27, 1864.

"Received of A. J. Gill five hundred and thirty-six tons of hay, in good order and well ricked, for use of Government.

"CLARK DUNN,

"*First Lieut. 1st Cav. of Col., Quartermaster of Camp Fillmore.*"

8 The said Dunn referred the claimant to the commander of the district and quartermaster at Denver, who could purchase the hay if they saw fit. The commander of the district, however, thought he would not be justified in purchasing it at that time, and did not do so.

It does not appear that the claimant ever returned to where the hay was after the refusal of the commander of the district to buy it; but in consequence of the Indian troubles existing in the winter of 1864–'65, it was unsafe for small parties to remain outside of Government posts,

especially in that locality, and he was therefore compelled to leave the hay without any one in charge of it, and on the 4th of February, 1865, he left Colorado on a business trip, and did not return thither until the summer of 1866.

The statement thus far is to a large extent in the words of the claimant himself, as found in his petition and affidavit.

The use and abuse of his hay by Government troops, or parties in the Government service, rests upon the evidence of witnesses.

Upon the whole case the majority of the court give him judgment for three-fourths of the 536 tons of hay, as having been either used or trodden down and ruined by such troops and parties; and the judgment is at the rate of $45 per ton, which is six dollars and fifty cents more per ton than the claimant demanded in his petition, or in the brief of his counsel.

The case, condensed, is this: that, without the order or request of any officer of the Government, the claimant cut and ricked 536 tons of hay, ostensibly in connection with a contract, but in reality for speculation on the Government; that it was cut and ricked in a wild country, which was so infested with hostile Indians as to preclude his leaving any one in charge of it; that he tried but failed to sell the hay to the Government, and from the time of such failure till the present he has, so far as shown, never attempted to exercise ownership over the hay, but, as I consider, abandoned in the wilderness what he was powerless to keep in possession or to protect, and what, after the refusal of the Government officers to buy, he could put to no possible use.

I can see no right or justice in making the Government pay for hay so abandoned. The following are the reasons for my dissent:

1. If the claimant ever had property in the 536 tons of hay, he renounced it when he left the hay in a wild and savage land, where he had, and could have, no force or law to protect it, and where he dared not go, or have another go, to guard or even oversee it. So to leave it was necessarily to abandon it to inevitable and speedy decay, or to destruction by marauders, or to the use of any wayfarers who, while using it, were able to protect themselves against the savages of that region.

2. If, however, the claimant had property in the hay, and Government troops and parties took and used the hay without his knowledge or consent—much more if they scattered and trampled it under foot—it was a trespass, for which no action lies in this or any other court against the Government. The case seems to me to be pointedly condemned by the expressions of the Supreme Court in Gibbons vs. United States, (8 Wallace, 269.) Said that court: "The language of the statutes which confer jurisdiction upon the Court of Claims excludes by the strongest implication demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties. In the absence of adjudged cases determining how far
9 the Government may be responsible on an implied assumpsit for acts which, though unauthorized, may have been done in its interest, and of which it may have received the benefit, the apparent hardships of many such cases present strong appeals to the courts to indemnify the suffering individual at the expense of the United States. These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting in the Court of Claims of all wrongs done to individuals by the officers of the Genera'

ment, though they may have been committed while serving that Government, and in the belief that it was for its interests. In such cases where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims."

3. But if the preceding views are erroneous, and the claimant's right of action should be held good, what should he recover? Manifestly no more than what the hay was worth to him at the spot where he left it, about fifteen miles from Fort Lyon, in a place where no civilized people lived, or could venture to attempt to live, and where a military guard was necessary while he was engaged in cutting the hay. When he cut and ricked it there, he knew the absolute impossibility of his removing it thence, except with military transportation and guard. And he knew, moreover, that he had not, and could not command, any such transportation or guard. And he still further knew that if the Government should decline to purchase and remove the hay, it was certain that it must stay till it rotted just where he ricked it, unless it should be fed to the animals of parties passing by.

Its value to him at that spot is, therefore, the measure of his damages, if he is entitled to any. The value of hay delivered at Fort Lyon affords no criterion for estimating the value of hay at the place where this was. I have looked in vain in the record for any evidence that the claimant's hay at the Point of Rocks, fifteen miles away from Fort Lyon, had any money-value whatever. It is evident to me that his view of its value was not in the thing itself, which he could not utilize, but in the anticipated sale of it to the Government, which could utilize it. When that hope vanished, so did the money-value of the hay to him. There was but one possible market for it in all that great region, and when that failed there was probably not a man in the United States who would have given him ten cents a ton for what it might have cost him his scalp to attempt to reduce to possession.

These are my reasons for dissenting from the judgment of a majority of the court.

10 In the Court of Claims.

ANDREW J. GILL (No. 2) *vs.* THE UNITED STATES. } No. 6196.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the Attorney-General for the defendants for the allowance of an appeal, as filed in the clerk's office December 17, 1873, and of the order of the chief-justice of said court, allowing the same; of the finding of facts and the conclusions of law thereon, upon which the court founded its judgment; of the opinion of the court, delivered by Judge Nott, and of the dissenting opinion of Chief-Justice Drake.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this seventh day of January, A. D. 1874.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 365. The United States, appellants, vs. Andrew J. Gill. Court of Claims. Filed 15th January, 1874.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

THE UNITED STATES, APPELLANTS,
vs.
A. J. GILL.
} No. 365.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

THE UNITED STATES, APPELLANTS,
vs.
A. J. GILL. } No. 365.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

STATEMENT.

In the fall of the year 1864, the claimant, under a written contract, furnished to the United States at Point of Rocks and vicinity, west of Fort Lyon, Colorado, on the Arkansas River, 2,000 tons of hay at $38.50 per ton, which was duly received and paid for by the United States.

Anticipating a further demand for hay by the United States at that point, the claimant continued cutting hay until frost came, because he believed the Government would need any surplus that he might have. The result was, that he prepared and had ready the additional quantity of 536 tons of hay, over and above the 2,000 tons furnished under his contract. (Record, p. 1.)

"On the 27th November, 1864, he applied to Lieutenant Clark Dunn, the commanding officer at Fort Fillmore,

to purchase the same for the use of the defendants. Lieutenant Dunn declined to make the purchase, on the ground that he was not authorized, but he gave to the claimant his receipt in writing, wherein it was stated that he had "received of A. J. Gill five hundred and thirty-six tons of hay, in good order and well ricked, for the use of the Government," which was signed "Clark Dunn, first lieutenant First Cavalry of Colorado, commanding Camp Fillmore;" and he at the same time referred the claimant to the commander of the district and to the quartermaster at Denver, who could purchase the hay if they saw fit. The commander of the district was applied to, but declined to purchase at that time. During the same month the military inspector of the district of Colorado, anticipating a short supply of hay for the winter, ordered Lieutenant Cossett, the quartermaster of Fort Lyon, "to take the hay belonging to Andrew J. Gill and use it for Government stock. After this the claimant exercised no control over the hay. The claimant left Colorado on the 4th February, 1865, on business of his own, and did not return until the summer of 1866." (Record, p. 3.)

In December, 1864, and during the winter of 1864–65, about one-half of the hay was used by Government animals, and about one-quarter had been thrown out of the ricks and been trampled down, wasted, and destroyed. A board of survey being demanded in June, 1865, it was found that the balance remaining was spoiled and worthless. No emergency existed during the time the hay was used. The court decided, as a conclusion of law, that there was no valid, express contract, founded upon advertisement or military exigency for the sale and purchase of the hay. (Record, p. 3.) The fair and reasonable price of the hay in November, 1864, was

$38.50, and it was at this rate that the claimant demanded compensation. (Record, p. 1.) The judgment is at the rate of $45 per ton. (Record, p. 3.)

ASSIGNMENT OF ERRORS.

1. The court erred in entering judgment for the claimant.

2. The court erred in entering judgment for the claimant for the hay at the rate of $45 per ton.

3. The court erred in deciding that, notwithstanding there was no military exigency or a valid express contract by advertisement, the claimant should recover.

4. The court erred in deciding, in effect, that the defendants are responsible for acts of trespass committed by their officers or agents.

5. The court erred in assuming jurisdiction of the action, notwithstanding it was for property destroyed or appropriated by Government troops.

ARGUMENT.

1. There was no valid express contract founded upon advertisement (Act 2d, March, 1861, 12 Stat., 220, p. 10) or military emergency, (Act 4th July, 1864, 13 Stat., p. 394, p. 4,) and therefore the defendants were not liable for the hay alleged to have been sold, if the taking was not a trespass by Government troops. The refusal of the district commander to receive the 536 tons of hay belonging to the claimant was a notice to the claimant as well as to all officers and agents of the defendants that the hay would not be purchased for the use of the Government animals. The direction of the district inspector to the post-quartermaster at Fort Fillmore to use claimant's hay was illegal and of none effect, as it

was not within the line of his duty or within his power to declare an emergency. The law provides that when an emergency shall exist, it shall be lawful for the commanding officer to procure supplies during the continuance of the emergency, but no longer, in the most expeditious manner and without advertisement. (Act 4th July, 1864, 13 Stat., 394, 396, p. 4; Henderson's Case, 4 C. Cls., p. 75.)

In the present case the court decided that no military exigency existed, so not even the district commander could have lawfully ordered the purchase of the hay, much less could a staff officer, a subordinate, a district inspector, purchase it without previous advertisement. But here the district inspector directed its use without the semblance of authority to do so.

II.

If the hay was taken and used by order of an officer without authority to act, or by Government troops and parties without the claimant's knowledge and consent, and when he had left the Territory, much more if they scattered and trampled it under foot, it was a trespass, and the Court of Claims had no jurisdiction of the case. The Supreme Court, in the case of Gibbons v. Wallace, 269, said "The language of the statutes which confer jurisdiction upon the Court of Claims, excludes, by the strongest implication, demands against the Government founded on torts. The general principle, which we have already stated as applicable to all governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties. In the absence

of adjudged cases determining how far the Government may be responsible, on an implied assumpsit, for acts which, though unauthorized, may have been done in its interest, and of which it may have received the benefit, the apparent hardships of many such cases present strong appeals to the courts to indemnify the suffering individual at the expense of the United States. These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting in the Court of Claims of all wrongs done to individuals by the officers of the General Government, though they may have been committed while serving that Government, and in the belief that it was for its interests. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims."

III.

The taking and using of the hay by the Government troops and parties was an "appropriation within the act of July 4th, 1864," (13 Stat., 381,) and the Court of Claims has no jurisdiction of the action. (Filor *vs.* U. S., 9 Wall., 45.)

IV.

The memorandum receipt given to claimant by Lieutenant Dunn was not binding upon the United States, there being no delivery or acceptance of the same on the part of Lieutenant Dunn, or any other officer, but, on the other hand it was accompanied by a statement by Dunn that he was not authorized to make the purchase, and was given as an accommodation to the claimant in order

that the district commander might know that he, Dunn, was cognizant of the fact that the claimant had 536 tons of hay cut and ricked in the vicinity of Fort Fillmore.

V.

The claimant demanded compensation for his hay at the rate of $38.50 per ton, and no more, and offered to sell the same to the Government for that price, and it was improper for the court to rate it as worth $45 per ton.

GEO. H. WILLIAMS,
Attorney-General
JOHN GOFORTH,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 365.

THE UNITED STATES, *Appellants*,

vs.

ANDREW J. GILL, *Appellee*.

APPEAL FROM THE COURT OF CLAIMS.

Brief for Defendant and Appellee.

This case is reported in full in 8th Court of Claims Reports, page 391.

The record sets forth the facts in detail, and the opinions of the Court *á qua* thereon, as to the law governing the case.

The facts being beyond all dispute, before this Honorable Court, there is no error of law known to counsel for appellee properly brought up for review here. The United States certainly urged none in their brief before the Court of Claims, unless under the point of "*appropriation*," which needs no detailed argument, in our opinion, to overcome. And, we submit, that the question whether there was an implied promise, is *a question of fact* on which the finding of the Court of Claims is conclusive. So too, in regard to the damages recovered on a *quantum meruit* or *quantum valebat*; the measure of damages in such cases "*becomes a* QUESTION OF EVIDENCE *as to the value of the property or services;*" "*What the thing or property is worth.*"

See Sedgwick on Damages, p. 254, Ed. 1869.

Also, J. H. Clarke & Co's. case, opinion by Justice Grier, published 7 C. Claims, 32. Not printed in Wallace.

We understand that your Honors will steadfastly adhere to the doctrine enunciated in your construction of the rules of Court regulating appeals from the Court of Claims: "their purpose was to bring nothing here for review but QUESTIONS OF LAW."

Mahan *vs.* United States, 14 Wall., 111.

Shrewsbury *vs.* Same, 18 Wall., 668, a case in which a certiorari to bring up most important written evidence was denied.

United States *vs.* Adams, 9 Wall., 661, and many other cases.

"*Certainty in practice is of the essence of benefit.*"

Pease *vs.* Norwood, L. R., 4 C. P. 258.

We submit:

First. That on general demurrer to the facts constituting the *case* in the Court below, the judgment here would be in favor of Gill.

Second. That if there is any error in the decree, or in the statement of facts, amount awarded, imperfect justice, contrary to evidence; or if the United States has fault to find with the doings of the Court, or has discovered any evidence, a motion for a NEW TRIAL is the remedy provided, as it seems to us, by law. The time for which will not expire until October 21, 1875. Record, p. 2.

Act June 25, 1868, 15 S. L., 65.

Should these views prevail with your Honors, we pray that this appeal may be dismissed. Otherwise, that the judgment of the Court of Claims be affirmed with costs, for the reasons assigned in the opinion of the majority of the Judges of the lower Court.

Respectfully submitted,

DURANT & HORNOR,

Att's. for Appellees.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~433~~. 15-2

ANDREW J. GILL, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 2, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 433.

ANDREW J. GILL, APPELLANT,

VS.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 *Petition.—Filed July* 16, 1870.

U. S. Court of Claims.

ANDREW J. GILL, No. 1,
vs.
THE UNITED STATES. } No. 6195.

To the honorable Court of Claims:

The petition of Andrew J. Gill, a citizen of the United States, respectfully represents:

That Ernest D. Wheeler, on the twenty-fifth day of August, A. D. 1866, acting for and on behalf of petitioner, entered into a written contract with Captain H. L. Thayer, A. Q. M., acting on behalf of the United States, for delivery at Fort Lyon, C. T., of twelve hundred cords or wood. A copy of said contract, marked Exhibit "A," is hereto annexed, and petitioner prays may be considered and read as part of this petition.

Petitioner further shows, that on or about the twenty-seventh day of September, A. D. 1866, Capt. H. L. Thayer, A. Q. M., notified petitioner and his agent, E. D. Wheeler, that twelve hundred cords of wood would be required upon said contract unless the amount should be changed by competent authority.

Petitioner further shows, that the amount of twelve hundred cords of wood required to be delivered at Fort Lyon, C. T., by the terms of said contract, and by said notice, was never changed by the United States.

Petitioner further shows, that, agreeably to the terms and requirements of the said contract, he did deliver at Fort Lyon, C. T., within the Government enclosure, as directed by the post quartermaster, twelve hundred cords of wood.

Petitioner further shows, that of the said twelve hundred cords of wood there was receipted for by the post quartermaster at Fort Lyon, C. T., eight hundred cords, and no more, and that he has been paid for said wood by the United States the sum of eleven thousand seven hundred and ninety-two dollars, ($11,792,) and no more.

2 Petitioner further shows, that of the four hundred cords of wood not receipted for or paid for by the United States, three hundred and sixty cords was sold by petitioner's agent under advice of the post quartermaster at Fort Lyon, C. T., after the expiration of the said contract, for the sum of one thousand and eighty dollars, that being the highest and best price obtainable for the same after the expiration of said contract.

Petitioner further shows, that there is due him from the United States upon the said contract the sum of four thousand two hundred twenty-six $\frac{40}{100}$ dollars, ($4,226.40.)

Petitioner further shows, that he and his agent, E. D. Wheeler, have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and petitioner prays the judgment of this honorable court for the said sum of four thousand two hundred and twenty-six $\frac{40}{100}$ dollars, ($4,226.40,) and for such other and further relief as the nature of the case may show he is entitled to.

HARVEY SPALDING,
Attorney for Claimant.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Harvey Spalding, being duly sworn, deposeth that he is attorney for the claimant in the foregoing petition; that no assignment or transfer of said claim, or any interest therein, or any part thereof, has been made except as in said petition is stated; that claimant is justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

HARVEY SPALDING.

Sworn to and subscribed before me this 10th day of July, 1870.
[SEAL.] EDM. F. BROWN,
Notary Public.

Claimant's address: A. G. GILL, Denver, C. T.

Claimant's solicitors: C. F. PECK and HARVEY SPALDING, Washington, D. C.

3 EXHIBIT A.

This contract, made and entered into at Fort Lyon, Colorado Territory, this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and sixty-six, by and between Captain H. L. Thayer, A. Q. M., U. S. V., for and in behalf of the United States of America of the first part, and E. D. Wheeler, of the city of Denver, county of Arrapahoe, Colorado Territory, of the second part, witnesseth: That the said E. D. Wheeler agrees to deliver at Fort Lyon, Colorado Territory, twelve hundred cords (or such amount as may be required, to be determined by the chief quartermaster of the Department of the Missouri) of good merchantable wood, properly corded, at such place at Fort Lyon, Colorado Territory, as the post quartermaster may direct. The delivery of said wood to commence November, 15th, 1866, and to be delivered at the rate of at least two hundred cords per month until the completion of this contract.

And the said party of the second part further agrees, that if default shall be made by the said party of the second part in the time of the delivery of the said wood, or in any of the provisions of this contract, the said party of the first part shall have power to supply any deficiency that may exist by purchase in open market or in such manner as he may elect, and the said party of the second part shall be charged with the difference in cost.

The said party of the first part hereby agrees for and in behalf of the United States of America to pay or cause to be paid to the party of the second part the sum of fourteen dollars and seventy-four cents per cord for each and every cord of wood delivered and accepted in accordance with the terms of this contract; payments to be made on the delivery of every two hundred cords, or as soon thereafter as funds shall be received for that purpose.

It is expressly understood by and between the parties to this contract that no member of Congress shall be admitted to any share or part therein or any benefit to arise therefrom.

In witness whereof the said parties have hereunto set their hands and seals on the day and year first above written.

(Signed) H. L. THAYER, [SEAL.]
Capt., A. Q. M.

(Signed) E. D. WHEELER.

4 Witnesses to signature of Capt. H. L. Thayer:
(Signed) C. H. KIMBALL.
(Signed) HENRY W. WHIGHORN.

Witnesses to signature of E. D. Wheeler:
(Signed) ALEX. W. ATKINS.
(Signed) G. H. MILLS.

Attorneys for claimant: C. F. PECK and H. SPALDING, Washington, D. C.

Claimant's address is Denver City, Colorado Territory.

5 In the United States Court of Claims, December term, A. D. 1869.

ANDREW J. GILL, No. 1,
vs.
THE UNITED STATES. } No. 6195.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of forty-two hundred and twenty-six dollars and forty cents, the said defendants say that they are not indebted to the said claimant for the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THOM'S H. TALBOT,
Assistant Attorney-General.

6 United States Court of Claims.

ANDREW J. GILL
vs.
THE UNITED STATES. } No. 6195.

Plea in abatement by T. H. Talbot, Assistant Attorney-General.—Filed November 23, 1870.

And now come the defendants, by their Attorney General, and say that the said claimant ought not further to maintain his action aforesaid, for that the contract upon which this suit is brought, as alleged in said petition, was made with one Ernest B. Wheeler, and not with said claim-

ant, and that therefore said claim should be prosecuted in the name of said Wheeler; and prays judgment, &c.

T. H. TALBOT,
Assistant Attorney-General.

7 In the United States Court of Claims, December term, 1870.

ANDREW J. GILL, No. 1,
vs.
THE UNITED STATES. } 6195.

Now comes the said plaintiff, and saith that the said plea in abatement is not good in law, and that the said plaintiff ought not to be barred by reason of anything therein contained; wherefore he prays judgment, &c.

C. F. PECK,
Solicitor for Pl'ff.

8 In the United States Court of Claims, Dec. term, 1870.

ANDREW J. GILL, No. 1,
vs.
THE UNITED STATES. } 6195.

At a Court of Claims held at the Capitol, in the city of Washington, the 23d day of January, 1871.

The demurrer to the plea filed in this case was sustained.

By the court.

9 In the United States Court of Claims, December term, 1870.

ANDREW J. GILL
vs.
THE UNITED STATES. } 6195.

Plea.

Now come the defendants, by their Attorney-General, and, not waiving any plea or answer heretofore pleaded herein, say that the claimant should not further have or maintain his suit against the defendants, for that it appears by the records and files of the court that the said claimant heretofore, to wit, on the 16th day of December, 1868, brought his suit in this court in the name of one E. D. Wheeler, in which suit he made the identical claim against the defendants which he makes herein, and the said suit so brought by the claimant in the name of E. D. Wheeler is still pending.

All of which the defendants are ready to verify, and therefore pray the judgment of the court that the petition of the said claimant be dismissed.

THOMAS H. TALBOT,
Ass't Att'y General.

10 In the United States Court of Claims, Dec. term, 1871.

ANDREW J. GILL, No. 1,
vs.
THE UNITED STATES. } 6195.

Now comes the said plaintiff by his attorney, C. F. Peck, and saith that he ought not to be barred of his said action by anything contained

in the said plea of the said defendants, alleging a former suit brought in the name of one E. D. Wheeler; because he saith that the said plea is not sufficient in law.

Wherefore he prays judgment, &c.

C. F. PECK,
Att'y for Claimant.

11 In the United States Court of Claims.

ANDREW J. GILL
vs.
THE UNITED STATES. } 6195.

At a Court of Claims held at the Capitol, in the city of Washington, February 19th, A. D. 1872.

Per curiam.

The demurrer of the claimant to the special plea in abatement of the defendants, filed April 28, 1871, is sustained, with leave to the defendants to answer over.

By the court.

12 In the Court of Claims.

ANDREW J. GILL, No. ONE,
vs.
THE UNITED STATES. } 6195.

At a Court of Claims held at the Capitol, in the city of Washington, twenty-ninth of April, A. D. 1872, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant's petition be dismissed.

By the court.

13 In the United States Court of Claims.

ANDREW J. GILL, No. ONE,
vs.
THE UNITED STATES. } No. 6195.

The petition of Andrew J. Gill respectfully represents that he is informed and believes there is error to his prejudice in the judgment lately rendered against him in the above-entitled cause in this honorable court, from which he desires to appeal.

Wherefore he prays that an appeal may be allowed him from said judgment to the Supreme Court of the United States.

CHARLES F. PECK,
By THOMAS J. DURANT,
For Petitioner.

Filed in the clerk's office May 1, 1872.

Ordered, that the appeal as prayed for be allowed.
By the court.
May 1, 1872.

14 United States Court of Claims.

ANDREW J. GILL, No. 1,
vs.
THE UNITED STATES.

The specific facts of this case, as found by the court, are as follows, viz:

1. This suit was brought on the following contract:

"This contract, made and entered into at Fort Lyon, Colorado Territory, this twenty-fifth day of August, in the year of our Lord one thousand eight hundred and sixty-six, by and between Captain H. L. Thayer, A. Q. M., U. S. V., for and in behalf of the United States of America, of the first part, and E. D. Wheeler, of the city of Denver, county of Arapahoe, Colorado Territory, of the second part, witnesseth:

"That the said E. D. Wheeler agrees to deliver at Fort Lyon, Colorado Territory, twelve hundred cords (or such amount as may be required, to be determined by the chief quartermaster of the Department of the Missouri) of good merchantable wood, properly corded, at such place at Fort Lyon, Colorado Territory, as the post quartermaster may direct; the delivery of said wood to commence November 15th, 1866, and to be delivered at the rate of at least two hundred cords per month until the completion of this contract.

"And the said party of the second part further agrees, that if default shall be made by the said party of the second part in the time of the delivery of the said wood, or in any of the provisions of this contract, the said party of the first part shall have power to supply any deficiency that may exist by purchase in open market, or in such manner as he may elect, and the said party of the second part shall be charged with the difference in cost.

"The said party of the first part hereby agrees, for and in behalf of the United States of America, to pay or cause to be paid to the party of the second part the sum of fourteen dollars and seventy-four cents per cord for each and every cord of wood delivered and accepted, in accordance with the terms of this contract; payments to be made on the delivery of every two hundred cords, or as soon thereafter as funds shall be received for that purpose.

"It is expressly understood by and between the parties to this contract, that no member of Congress shall be admitted to any share or part therein or any benefit to arise therefrom.

"In witness whereof the said parties have hereunto set their hands and seals on the day and year first above written.

"H. L. THAYER, [SEAL.]
"*Capt., A. Q. M.*
"E. D. WHEELER.

"Witnesses to signature of Capt. H. L. Thayer:
"C. H. KIMBALL.
"HENRY W. WHIGHORN.
"Witnesses to signature of E. D. Wheeler:
"ALEX. W. ATKINS.
"G. H. MILLS."

15 2. On the trial of this case the defendants put in evidence the record and judgment of the case of E. D. Wheeler vs. The United States, determined in this court in 1870, together with the deposition

of Andrew *I.* Gill, the present claimant, taken and filed by the defendants in that case.

3. On the 16th day of December, 1868, Ernest D. Wheeler, the identical person who signed the contract upon which this suit is brought, and hereinbefore set out in finding No. 1, filed in this court his petition, which is hereto annexed, marked A, and wherein he sets up in his own behalf a claim for damages for the breach of the same contract for which this suit is prosecuted; the breach alleged by the said Wheeler being the same as that alleged by the claimant in this case.

4. On the trial of Wheeler's case the claimant's (Andrew J. Gill's) testimony was taken by the defendants, and he proved that he alone was interested in the claim then in litigation, and that he individually instituted that suit, and was prosecuting it for his own benefit; and that up to that time he had borne all the expenses thereof.

5. On the 24th day of May, 1870, Wheeler's cause was heard on its merits, and after argument of counsel on both sides, the court found that the contract sued on was transferred by Wheeler to the said Andrew *I.* Gill, the present claimant, and that by reason of the act of Congress approved July 17, 1862, he could not recover thereon; but as it appeared the United States had used a portion of the wood delivered under it, the claimant was entitled, on grounds of quantum meruit, to recover for the value of the wood used, and gave a judgment as follows, viz: "The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree, that the said Earnest D. Wheeler do have and recover of and from the United States the sum $589.60.

6. It further appears that the contract set forth in the petition was entered into on the day and date set forth, and signed by the parties as set forth.

7. That E. D. Wheeler, who signed the said contract, had no interest in it, and signed the same for and on behalf of the claimant.

8. That the claimant on his part carried out and performed fully the said contract, and delivered on said contract twelve hundred cords of wood of the quality specified in said contract, and corded the same as he was directed to do by the quartermaster at said post, and that such delivery of wood was effected by the claimant within the time specified in said contract, and at the rate per month specified therein; and that such delivery was completed before the defendant asserted any right to determine any other or different amount of wood for delivery at said post within the contract than the amount specified in said contract, viz, twelve hundred cords, eight hundred of which has been paid for by the United States and a judgment as aforesaid rendered in Wheeler's suit for forty cords.

9. That defendants refused to receive or pay for three hundred and sixty cords of said wood, which the claimant sold at $3 per cord.

10. That the actual market value of said three hundred and sixty cords of wood thus left on the hands of the claimant was $1,080 and no more.

11. That the claimant never aided the rebellion in any manner.

By the court.

16 In the Court of Claims.

ANDREW J. GILL, No. 1,
vs.
THE UNITED STATES. } No. 6195.

I, John Randolph, assistant clerk of the Court of Claims, do hereby

certify that the foregoing are true transcripts of the pleadings in the above-entitled cause and the final judgment of the court thereon; of the application of the solicitor for the claimant for the allowance of an appeal, as filed in the clerk's office May 1, 1872, and of the order of the court, May 1, 1872, allowing the same; of the findings of fact by the court, on which the court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this seventeenth day of February, A. D. 1873.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 433. Andrew J. Gill, appellant, vs. The United States Court of Claims. Filed 2d May, 1873.